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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740.

ELLA V. FORE,
Appellant,

vs.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLANT
Opposing Appellee's Motion to Dismiss or Affirm.

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In reply to Appellee's contentions we respectfully submit the following:

1. Appellee endeavors to show that this case was not decided in a vacuum by the Supreme Court of Ohio and that due process was not therefore offended by stating as to her failure to file a bill of exceptions with the Supreme Court of Ohio bringing up the transcript of the evidence taken before the Court of Appeals by saying:

> "The lower court having based its decision on the transcript of testimony, then such transcript became a part of the record of the case subject to review by the Ohio Supreme Court, and therefore it was unnecessary to have a bill of exceptions in this matter."

This is indeed novel law. In Ohio there is one and one way only to present the transcript of evidence to the reviewing court and that is by a bill of exceptions. The Supreme Court of Ohio itself in its opinion stated that it

determined the errors of the Court of Appeals from the journal entry alone of that Court (168 Ohio St. at page 372):

> "Since the error which is the basis of this reversal is apparent from the entry of the Court of Appeals, it is not necessary to our decision that there is a bill of exceptions. The motion of Appellee to dismiss is therefore overruled."

Yet that journal entry states no facts but only conclusions of law (R. p. 19 and Appendix C to Jurisdictional Statement).

That this decision of the Supreme Court of Ohio made with *no facts* before it was violative of procedural due process of law is made the more manifest by a decision rendered by that Court on March 18, 1959, approximately two and one-half months after the decision which is the subject of this appeal. In the case of *In re Sublett*, 169 Ohio St. 20, the Court in a habeas corpus action which originated in the Court of Appeals of Franklin County, Ohio, followed the law of Ohio, which it has applied uniformly in every case but this present one, by holding that since no bill of exceptions had been filed with it, the appeal would be dismissed.

The Court stated:

> "*Per Curiam*. The cause has been submitted on the transcript of docket and journal entries and the original papers filed in the Court of Appeals. There being no bill of exceptions, the court cannot say that there was no substantial evidence warranting the Court of Appeals in reaching the conclusion it did. On appeal on questions of law, all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment under review and of the regularity and legality of the proceeding below.

"The judgment of the Court of Appeals is affirmed.
"Judgment affirmed."

Nothing could better emphasize the failure of the Supreme Court of Ohio to accord this Appellant procedural due process of law in deciding the instant case with no bill of exceptions before it than *In re Sublett*. In that case as this, there was an appeal of right in a habeas corpus action from a Court of Appeals. In that case as this there was no bill of exceptions, but the Court had before it only the transcript of docket and journal entries and original papers filed in the Court of Appeals. Yet contrary to all the Ohio decisions on the point and contrary to its subsequent decision in *In re Sublett*, in the instant case the Court disregarded the necessity for a bill of exceptions, found facts where none existed in the journal entry of the Court of Appeals, and reversed the Court below.

2. Appellee chiefly relies upon the theory that the mere bringing into and physical presence of the child in Ohio was sufficient to give the Probate Court of Cuyahoga County, Ohio jurisdiction to appoint Appellee the guardian. This we contend is not the law, but since the Supreme Court of Ohio so held in this case, it is then for this Court itself to follow its self-announced duty of deciding between the competing policies of Louisiana and Ohio, both of which have asserted jurisdiction. See *Hughes v. Fetter*, 341 U. S. 609, 611, and *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 210. Certainly the rules of the *Restatement of the Conflict of Laws* are that only the state of the child's domicil may appoint a guardian and that mere physical presence is not sufficient to give jurisdiction. This rule is supported by the great weight of authority on the subject, and the cases to the contrary are almost without exception cases involving the struggle between parents over children attendant upon divorce.

3. Equally the authorities, including the *Restatement of Conflict of Laws*, make clear that the state of the child's domicil exclusively has the power to appoint a guardian. Although the child is not present within the jurisdiction of the domiciliary state, such a decree is entitled to full faith and credit. *Restatement of Conflict of Laws*, § 117, Note d, "*Effect in other states of appointment of guardian.* The exercise by a state of jurisdiction through its courts under the rule stated in this section will be recognized in other states * * *." The rule of § 117 of the *Restatement* as set forth in the Jurisdictional Statement at page 14 thereof is that only the state where the child is domiciled may appoint a guardian for the child. The Ohio Supreme Court itself recognized the child was domiciled in Louisiana in its decision and syllabus.

4. There was before the Court of Appeals and before the Supreme Court of Ohio absolutely no question of suitability as to who was the proper guardian of the child. That question could and can only be determined by the state having jurisdiction to appoint a guardian. That state is Louisiana, the state of the parents' and the child's domicil.

5. The State of New York had absolutely no power to make an award of custody to Appellee in the habeas corpus action brought by Mrs. Ida Fore Tillery, one of the child's paternal aunts. Mrs. Tillery brought the action based on the Mississippi order appointing her the child's guardian. When the New York Court denied that writ it simply left the Appellee in possession of the child, and she went on into Ohio and immediately obtained the *ex parte* Ohio decree appointing her the guardian.

6. Nor was Appellee acting in the capacity of *loco parentis*. She had simply been given possession of him by the

Army for transportation to the United States, and in total disregard of the rights of the child's other relatives including two paternal aunts and the Appellant, obtained the *ex parte* Ohio decree immediately on her arrival with the child in Cleveland, Ohio.

7. Obviously Section 2151.06, Ohio Revised Code, being a part of the Juvenile Court Act of Ohio, has no application to this case, as it deals with the appointment of custodians for abandoned and neglected children by the Juvenile Courts of Ohio. This child was never the subject of any action in any Juvenile Court, nor did the Supreme Court of Ohio even mention this statute in reaching its decision.

8. Appellee seeks to justify the introduction in her brief in the Supreme Court of Ohio, of the so called "Record" of the Supreme Court of New York upon the basis of our letter in opposition to Appellee's Motion For Stay of Execution of Judgment of the Court of Appeals in which we stated that the New York Court did not "award custody" of the child to Appellee. Obviously all it could do or had the power to do, all of the parties to that action being non-residents of New York, was to grant or deny the application of Mrs. Tillery based on the Mississippi judgment. To the extent that it purported to do more it exceeded its jurisdiction. As the Court of Appeals said in its opinion:

> "The dismissal of the petition for a writ of habeas corpus in the New York case (although the record is silent on the question) could be for the same reason the respondent should not prevail here. That is the authority depended on as the basis for seeking custody was not from the state of the child's domicile." 151 N. E. (2d) 777 at 782.

Evidently Appellee thought so too, for she immediat ly upon arrival in Ohio, sought custody of the child in the Probate Court of that state. Our letter merely went to the Motion to stay execution of the judgment of the Court of Appeals. That issue was determined by the Chief Justice of the Supreme Court and the stay was granted. Certainly it afforded no justification for the Supreme Court of Ohio not to rule upon *and utterly disregard* Appellant's Motion to strike this unauthenticated "Record" which had never been introduced into evidence. The appeal to the Supreme Court of Ohio was on questions of law and that Court on review could only consider the evidence introduced before the Court of Appeals as embodied in a bill of exceptions. No such bill was filed and certainly that Court had no right to consider material in the nature of evidence not introduced before the trial court and ignore Appellant's Motion to strike the same. No issue was before the Supreme Court of Ohio as to the New York action, involving as it did *different parties in a separate action.*

Accordingly, we submit that the federal questions presented are substantial and important, and that the Motion to Dismiss or Affirm should be overruled.

Respectfully submitted,

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